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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)	CASE NO. IPC-E-01-43
THE COMMISSION STAFF REQUESTING)	
THAT THE COMMISSION INVESTIGATE)	RESPONSE OF IDAHO POWER
THE BUY-BACK RATE IN THE LETTER)	COMPANY TO ASTARIS' MOTION
AGREEMENT ENTERED INTO BY IDAHO)	TO DISMISS AND BRIEF ON
POWER COMPANY AND ASTARIS LLC)	COMMISSION AUTHORITY
_____)	

Astaris LLC, Astaris Idaho LLC and FMC Corporation (collectively "Astaris") have filed a pleading entitled Motion To Dismiss and Brief On Commission Authority. As was agreed at the prehearing conference held on January 14, 2002, parties desiring to file a response to any motions would do so within fourteen days, or in this case, February 11, 2002. Idaho Power Company ("Idaho Power") submits this Response to the Motion of Astaris.

PREFACE

Before discussing the Motion of Astaris, the position of Idaho Power in these proceedings should be noted. Idaho Power believes that its function is to ensure

(to the extent Idaho Power can assist) that the Commission is apprised of the appropriate facts and legal authority concerning Staff's proposal to reduce the prices paid to Astaris by Idaho Power for Astaris reducing its consumption of power. Idaho Power does not intend to argue either pro or con, but only to assist the Commission in ensuring that the Commission has the necessary record (both evidentiary and legal) upon which to base its decision.

THE MOTION AND BRIEF OF ASTARIS

While entitled a Motion To Dismiss and Brief On Commission Authority, the pleading itself is somewhat rambling and vague. Much of the Brief is more in the nature of a prehearing brief than a brief questioning the Commission's "jurisdiction" to hold a hearing. To the extent the Brief challenges the "authority" of the Commission to hold a hearing, i.e., the Commission's "jurisdiction", Idaho Power will respond. To the extent the Commission has the authority to take some affirmative action after the hearing, that action must await the conclusion of the hearing. Idaho Power's Brief as to that issue will be filed after the hearing. At this time Idaho Power will only submit its comments on two issues raised in the Brief of Astaris that must be addressed before the hearing is held on February 21 and 22, 2002.

1. Astaris is not a vendor under the load reduction contract.
2. The Commission has jurisdiction to investigate the contract and consider the affirmative relief requested in Staff's Petition.

ASTARIS IS NOT A VENDOR UNDER THE LOAD REDUCTION CONTRACT

It is unfortunate that the arrangement with Astaris has been referred to as a buy-back program. Such is obviously not the case legally. Astaris is not providing energy to Idaho Power; Idaho Power is not buying back energy. At Page 9 of Astaris' Brief is the statement:

Staff's analysis is flawed because the buy-back transaction is not a sale of regulated utility service to a retail customer pursuant to a contract, but rather is the reverse: a private vendor transaction to supply a good or service to a utility.

Astaris then repeats the term "buy-back" over and over as if repeating the term often enough will make it so. The energy is not transferred to Astaris and then back to Idaho Power. Nothing is provided by Astaris to Idaho Power other than the agreement from Astaris that it would reduce its consumption and Idaho Power would pay Astaris for that reduction in consumption. The transaction is more appropriately described as Idaho Power paying Astaris for Astaris reducing the consumption of power Astaris is legally entitled to consume. There is no buy-back. There is no transfer of property. Astaris is not providing a service to Idaho Power. The agreement not to consume is not a service. It is a reduction in consumption which permits Idaho Power to avoid a service commitment. Astaris is not a vendor of a good or service.

THE COMMISSION HAS JURISDICTION TO INVESTIGATE THE CONTRACT

A review of Title 61, Chapter 5, indicates the Commission has jurisdiction in this proceeding:

61-501. Investment of authority. — The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act. (emphasis added)

61-502. Determination of rates. — Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursions or commutation tickets, or that the rules, regulations, practices, or contracts or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force and shall fix the same by order as hereinafter provided, and shall, under such rules and regulations as the commission may prescribe, fix the reasonable maximum rates to be charged for water by any public utility coming within the provisions of this act relating to the sale of water. (emphasis added)

61-503. Power to investigate and fix rates and regulations. — The commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices or schedule or schedules in lieu thereof. (emphasis added)

It cannot be disputed that the above statutes clearly provide that utility contracts are subject to the Commission's jurisdiction. Thus the issue is not whether the Commission has jurisdiction, but when in exercising that jurisdiction does the Commission have the

authority to modify a utility contract. The cases cited by Astaris do not stand for the proposition that the Commission lacks jurisdiction to investigate when a contract should be modified. Rather, the cases set forth the standard by which the Commission exercises its authority to modify a contract. *Agricultural Prod. v. Utah Power & Light Co.*, 98 Idaho 23, 557 P.2d 617 (1976) sets forth the standard of when the public interest requires that a contract be modified. There must be evidence to support the Commission's decision to modify the contract. A hearing is necessary to obtain the evidence upon which a determination could be made as to whether it is in the public interest to modify a utility contract.

Astaris blends the concepts of jurisdiction and authority and uses the terms interchangeably. The Commission is the tribunal which has jurisdiction to review a contract involving rates, charges and services. Whether the Commission should exercise its authority to revise, amend or modify the contract must be based upon the record that is developed before the Commission. A simple analogy should make the distinction between jurisdiction and authority clear. Obviously the Commission has jurisdiction to set the rates charged by a public utility in the state of Idaho. The Commission, however, does not have the authority to set those rates at zero. This is the distinction which Astaris has failed to make in their Brief and Motion.

CONCLUSION

Astaris is not a vendor that is providing a good or service to Idaho Power Company. The load reduction contract between Idaho Power and Astaris permits Idaho Power to reduce its service to Astaris.

The Commission has jurisdiction to conduct an investigation to determine if the load reduction agreement between Astaris and Idaho Power should be modified. Whether the Commission should exercise its authority to modify the contract is dependent upon the record developed before the Commission in this docket.

Dated at Boise, Idaho, this 11th day of February, 2002.


LARRY D. RIPLEY
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